Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

No. 78-1903

In the Supreme Court of the United States

OCTOBER TERM, 1978

FREDERIC B. INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 3

Conclusion 11

CITATIONS

Cases:

United States v. *Barash*, 365 F. 2d 395 10

United States v. *Barash*, 412 F. 2d 26, cert. denied, 396 U.S. 832 9

United States v. *Beechum*, 582 F. 2d 898, cert. denied, No. 78-5774 (Feb. 21, 1979) 4, 5, 6

United States v. *Czarnecki*, 552 F. 2d 698, cert. denied, 431 U.S. 939 6

United States v. *DeMet*, 486 F. 2d 816 8

United States v. *Doolittle*, 507 F. 2d 1368, cert denied, 430 U.S. 905 7

United States v. *Feola*, 420 U.S. 671 7

United States v. *Hall*, 536 F. 2d 313, cert. denied, 429 U.S. 919 9

United States v. *Hanon*, 428 F. 2d 101, cert. denied, 402 U.S. 952 7

United States v. *Hathaway*, 534 F. 2d 386 8

Page

Cases—(Continued):

United States v. *James*, 555 F. 2d 992 ..... 4, 5

United States v. *Kahn*, 472 F. 2d 272, cert. denied, 411 U.S. 982 ..... 8, 9, 10

United States v. *LeFaivre*, 507 F. 2d 1288, cert. denied, 420 U.S. 1004 7

United States v. *Nichols*, 534 F. 2d 202 6

United States v. *Peskin*, 527 F. 2d 71, cert. denied, 429 U.S. 818 ..... 5, 7, 8, 9, 10

United States v. *Prince*, 529 F. 2d 1108, cert. denied, 429 U.S. 838 7

United States v. *Senak*, 527 F. 2d 129, cert. denied, 425 U.S. 907 ..... 4, 5

United States v. *Sigal*, 572 F. 2d 1320 6

Statutes and rules:

18 U.S.C. 111 7

18 U.S.C. 201 9

18 U.S.C. 371 2

18 U.S.C. 1343 2

18 U.S.C. 1951 8

18 U.S.C. 1952 ..... 2, 8

Ill. Rev. Stat. ch. 38, §33-1 ..... 2, 8

Page

Statutes and rules—(Continued):

Federal Rules of Evidence:

Rule 403 6

Rule 404(b) 2, 4, 5, 6

Miscellaneous:

H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973) 4

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1903

FREDERIC B. INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 595 F. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1979. A petition for rehearing was denied on April 23, 1979 (Pet. App. 75a-76a). Pursuant to an extension of time granted by Mr. Justice Stevens, the petition for a writ of certiorari was filed on June 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence of other similar acts by petitioner as probative of intent pursuant to Rule 404(b) of the Federal Rules of Evidence.

2. Whether the defendant must know or reasonably foresee that the facilities of interstate commerce will be used in order to be found guilty under the Travel Act (18 U.S.C. 1952).

3. Whether the trial court's instruction to the jury concerning petitioner's defense of economic extortion was improper.[1]

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of violating the Travel Act, 18 U.S.C. 1952, and the Wire, Radio, Television Fraud Act, 18 U.S.C. 1343, and of conspiring to commit those offenses in violation of 18 U.S.C. 371. The Travel Act counts charged petitioner with travel in interstate and foreign commerce with the intent to promote and facilitate violation of the Illinois bribery statute. Ill. Rev. Stat. ch. 38, §33-1. Petitioner was sentenced to a total of four years' imprisonment.

---

[1]Petitioner also argues (Pet. 20-22) that the district court abused its discretion by denying his motion for severance, and (Pet. 4) that he was deprived of a fair trial by the failure to disclose prior to the commencement of trial certain pretrial statements by a government witness. These questions were raised by petitioner's co-defendants in their pending petitions for a writ of certiorari. We have responded to these questions in our consolidated brief in opposition to those petitions, in *McPartlin* v. *United States*, No. 78-1751, *Bull* v. *United States*, No. 78-1754, and *Janicki* v. *United States*, No. 78-1755 and rely on that response here. We are sending petitioner a copy of that response.

The evidence presented at trial, which is summarized in the opinion of the court of appeals (Pet. App. 2a-12a), showed that petitioner, the chairman of the board of the Ingram Corporation, paid co-defendants McPartlin and Janicki and certain other persons more than $900,000 in bribes to obtain a multi-million dollar sludge-hauling contract from the Chicago Metropolitan Sanitary District. Co-defendant Janicki was a trustee of the sanitary district. Co-defendant McPartlin was an Illinois legislator. Co-defendant Bull, president of an Illinois towing company, served as an intermediary through whom some of the illegal payments were made. William J. Benton, an unindicted co-conspirator, was vice-president of Ingram Corporation. Benton personally made the illegal payments to the Illinois officials on behalf of Ingram Corporation.

ARGUMENT

1. Petitioner contends that evidence of other similar acts as proof of intent was improperly admitted by the court. This contention is without merit. Petitioner's primary defense at trial was that he did not intend the payments in question as a bribe, but only made them in response to extortion by the other co-defendants. At trial, the government introduced testimony concerning some earlier questionable business activity undertaken by Ingram Corporation in Brazil, and the petitioner's role in that activity.[2] This testimony, indicating that petitioner

---

[2]The evidence showed that Ingram Corporation was interested in an off-shore drilling project conducted by Petrobas, a Brazilian oil company partly owned by the Brazilian government. At a meeting with Benton and Chris Daley, another Ingram official, Levindo Caniero, the Petrobas official responsible for procuring the off-shore drilling contractor, agreed to provide inside information to Ingram Corporation to assure that it was the low bidder, in exchange for a "payoff or commission." The contract was then awarded to Ingram

had, on another occasion, approved surreptitious payments to a quasi-governmental official in order to secure preferential treatment on a bid in the absence of extortion, was highly probative evidence on the question of whether the payments to the Chicago officials were made with the intent to bribe.

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts may be admissible as proof of intent. Congress changed the phrasing of this rule that had been suggested by the Supreme Court in order to place "greater emphasis on admissibility." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 7 (1973). The rule permits admission of such evidence under the same standard of relevance as any other evidence, once it has been determined that it is relevant to an issue other than character—here, intent. See *United States* v. *Beechum*, 582 F. 2d 898, 911 n.13 (5th Cir. 1978), cert. denied, No. 78-5774 (Feb. 21, 1979); *United States* v. *James*, 555 F. 2d 992 (D. C. Cir. 1977).

Petitioner suggests that the evidence of Brazilian bribe payments was not admissible in the absence of a showing that petitioner's conduct violated Brazilian law. This contention is untenable. Rule 404(b) is not restricted to other crimes, but also includes non-criminal "acts." See *United States* v. *Senak*, 527 F. 2d 129, 143 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976). Petitioner's conduct in the Brazil transaction was quite similar to that involved in the Chicago transaction, and testimony as to the intent in

---

Corporation through a letter of intent. Caniero then threatened to withdraw the letter of intent because the company had not yet set up a Swiss bank account for him as agreed. Daley informed petitioner of this development, and petitioner put him in touch with an international banker to expedite establishment of the account. Ultimately, $172,000 was paid into the account (Pet. App. 34a-35a).

the former transaction is certainly probative of the intent in the latter.[3] The court was correct in upholding the admissibility of the evidence. *United States* v. *Senak*, *supra*; *United States* v. *Peskin*, 527 F. 2d 71, 84 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976).

Petitioner urges review on the ground that the court below adopted an overbroad rule approving the admission of evidence of minimal probative value under Rule 404(b) wherever it makes criminal intent "more likely". This contention is erroneous (Pet. 16-18). On the contrary, the court held that the evidence of prior acts must have "substantial relevance" to the issue involved (Pet. App. 35a). No conflict with other circuits exists on this issue. In *United States* v. *James*, 555 F. 2d 992 (D. C. Cir. 1977), the court declined to allow evidence of other acts to be introduced on the facts there that the evidence was both of little probative value and quite likely to be prejudicial, since it involved a dramatic and violent scene complete with guns and attempted escapes by leaping from windows. Similarly, *United States* v. *Beechum*, *supra*, is not in conflict with the decision below.[4] The court there required only that the extrinsic evidence relate

---

[3]Petitioner contends that "the transfer of these funds was no more relevant to petitioner's criminal intent than any lawful transfer made in or outside the United States" (Pet. 18). But the suggestion that surreptitious payments to obtain preferential treatment are no different than ordinary purchases of goods is insupportable.

[4]Petitioner's contention that the Fifth Circuit would have excluded this evidence on the authority of *Beechum* is contradicted by the vigorous dissent in *Beechum* that characterizes the decision as establishing a much more lenient standard for admission under Rule 404(b) than that prevailing in other circuits, including the Seventh. See 582 F. 2d at 922-923 (Goldberg, J., dissenting).

to an intent similar to the intent of the charged offense, and the court explicitly rejected the suggestion that a "high degree of similarity" was required. *Id.* at 911-914. Petitioner's contention that *Beechum* permitted the introduction of other evidence only because the extrinsic offense was identical to the charged offense (Pet. 17) is mistaken. The *Beechum* court flatly stated that it was not controlling whether the extrinsic evidence also showed a mail theft (the charged offense). 582 F. 2d at 916. The other cases cited by petitioner turn on their own facts and likewise do not suggest any conflict that requires resolution by this Court in the context of the present case.

Petitioner also suggests that this extrinsic evidence should have been excluded under Rule 403 because its potential prejudicial effect on the jury outweighed its probative value (Pet. 20). We disagree. The evidence introduced was most unlikely to have an invidious prejudicial effect. There is no reason to believe that this evidence would have been considered by the jury on any issue other than intent, and, in any case, extensive limiting instructions were given by the court (Pet. App. 40a). The standard applied by the court below in reviewing this determination was proper. It correctly declined to undertake a de novo review of the balancing of Rules 404(b) and 403 and held that the trial court's decision to admit was a proper exercise of its discretion (Pet. App. 40a). See *United States* v. *Sigal*, 572 F. 2d 1320, 1323 (9th Cir. 1978); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977); *United States* v. *Nichols*, 534 F. 2d 202, 204-205 (9th Cir. 1976). In fact, the trial court took a narrow view of the admissibility of other acts under Rules 404(b) and 403. It denied the government the opportunity to present additional proof of petitioner's involvement with certain kickback

arrangements and a slush fund for distributing money to Louisiana politicians (Pet. App. 34a n.27). It would be inappropriate for this Court to devote its limited resources to reweighing the balance between probative value and prejudicial effect on the particular facts of this case.

2. Petitioner challenges the trial judge's instructions that the defendant need not know or reasonably foresee that the facilities of interstate commerce will be used in order to be guilty under the Travel Act. This challenge is without merit. This situation is closely analogous to that in *United States* v. *Feola*, 420 U.S. 671 (1975), where this Court held that a defendant's knowledge of the jurisdictional peg of 18 U.S.C. 111, that the victim of an assault be a federal officer, is not an element of the offense. It is sufficient to incur liability that the actor had the criminal intent to do the acts specified. The same rule applies for the Travel Act. *United States* v. *Peskin*, 527 F. 2d 71, 78 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States* v. *LeFaivre*, 507 F. 2d 1288, 1298-1299 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Doolittle*, 507 F. 2d 1368, 1372 (5th Cir. 1975), cert. denied, 430 U.S. 905 (1977); *United States* v. *Hanon*, 428 F. 2d 101, 107-108 (8th Cir. 1970), cert. denied, 402 U.S. 952 (1971).[5]

---

[5]Petitioner's view that the decision below conflicts with *United States* v. *Prince*, 529 F. 2d 1108 (6th Cir.), cert. denied, 429 U.S. 838 (1976), is incorrect. That case dealt with a different factual situation in which all the defendant's activity was wholly intrastate.

3. Petitioner also contends that his conviction should be reversed because the trial judge's instruction on extortion (Pet. App. 25a-27a) was improper.[6] Because the indictment under 18 U.S.C. 1952 alleges that petitioner violated the Illinois bribery statute, Ill. Rev. Stat. ch. 38, §33-1, the court below correctly noted that this contention raises an issue of Illinois law (Pet. App. 27a-28a). See *United States* v. *Kahn*, 472 F. 2d 272, 277 (2d Cir.), cert. denied, 411 U.S. 982 (1973). No constitutional claim has been raised and petitioner advances no explanation of why this issue of state law is appropriate for review by the Court.

In any event, the court below correctly held that the extortion charge was proper. Petitioner's characterization of this issue as an "extortion defense" (Pet. 23-26) is a misnomer. The Illinois bribery statute does not recognize extortion as a defense to bribery nor does any Illinois case authority. *United States* v. *Peskin*, *supra*, 527 F. 2d at 83-84. The evidence presented by petitioner at trial concerning extortion was simply an attempt to negate the element of intent necessary to the bribery charge (Pet. 23). Petitioner cites *United States* v. *Hathaway*, 534 F. 2d 386 (1st Cir. 1976), and *United States* v. *DeMet*, 486 F. 2d 816 (7th Cir. 1973), but these cases do not support his contention (Pet. App. 29a-30a & n.21). These decisions interpret the federal offense of extortion under the Hobbs Act, 18 U.S.C. 1951. In suggesting that they are relevant

[6]This contention is not applicable to all of the counts on which petitioner was convicted under 18 U.S.C. 1952. On some of those counts, relating to payments made prior to February 1972, petitioner's defense was that he did not know of the payments (Pet. App. 25a n.18).

to the instruction that the trial judge should have given to the jury, petitioner is in effect contending that it would have been a complete defense for petitioner if it were established that his co-defendants violated the Hobbs Act. This suggestion is erroneous. Extortion is not a complete defense to bribery unless it is so provided by statute. *United States* v. *Kahn*, *supra*, 472 F. 2d at 278. The mere existence of extortion is no defense "[u]nless the extortion is so overpowering as to negate the criminal intent of wilfulness." *United States* v. *Peskin*, *supra*, 527 F. 2d at 83-84. There is nothing improper about convictions for extortion and bribery arising from the same transaction. *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976). A rule that bribery and extortion are mutually exclusive would be unreasonable, since "[a]lmost every bribery case involves at least some coercion by the public official." *United States* v. *Kahn*, *supra*, 472 F. 2d at 278.

Contrary to petitioner's contention, the charge of the trial judge was appropriate (Pet. App. 28a-33a) and completely consistent with the decisions in *Kahn* and *United States* v. *Barash*, 412 F. 2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969).[7] The court's instruction on economic loss coupled with the instruction regarding entitlement to the benefit simply set out the undeniable principle that a threat not to grant an undeserved benefit does not constitute extortion. The instruction established a dichotomy between petitioner's contention that he made payments only because the company was being threatened with unreasonable liquidated damages penalties and the withholding of money due for the pipeline (Pet. 7-8) and

[7]*Barash* involved a prosecution under the federal bribery statute, 18 U.S.C. 201, for bribery of Internal Revenue Service agents and therefore is technically not applicable to this question of Illinois law.

the government's contention that the payments were made in order to secure and extend the lucrative sewage hauling contract (Pet. App. 4a-8a). The instruction (Pet. App. 26a) that "[i]f one does not believe he is legally entitled to receive the thing in question, * * * there can be no legal justification for paying a public official to get it" is unobjectionable. Extortion is a possibility only when a benefit to which one is entitled is withheld. *United States* v. *Peskin*, *supra*, 527 F. 2d at 84.

The contention that *United States* v. *Kahn* is somehow at odds with this principle because the "extortion defense was * * * approved" there (Pet. 25) is mistaken. In *Kahn*, the court of appeals rejected the idea of an "extortion defense," noting that the evidence bore only on the intent to bribe (472 F. 2d at 278). The court rejected a challenge to the trial judge's instruction and affirmed the bribery conviction below.[8] Petitioner's additional contention that the court's instruction equated extortion with duress (Pet. 25-26) is also without merit. The duress defense contemplates an imminent fear of bodily harm. This could not be confused with extortion under the court's instruction. *United States* v. *Barash*, 365 F. 2d 395 (2d Cir. 1966), simply held that the defendant there was entitled to an instruction on economic coercion. Petitioner was accorded such an instruction, and it was a proper one.

---

[8]Contrary to petitioner's assertion (Pet. 25), the defendant's argument in *Kahn* did not concern withholding of a purely discretionary benefit. The defendant's bid had been accepted by the City Council and he alleged that corrupt officials threatened to withdraw the Council approval unless they were "paid off." 472 F. 2d at 277.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

AUGUST 1979